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Neighbor-to-Neighbor Disputes: They are Such a Nuisance

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Not a week goes by that we do not hear from a manager or member of a board of directors inquiring as to whether or not the association has to enforce the governing documents. Often, the enforcement "issue" has to do with an alleged nuisance that may be impacting only one owner such as cigarette or marijuana smoke, noises from hard surface flooring in the unit above, or an odor. This question often leads to debate between board members, as to whether the association is absolutely obligated to enforce the restrictions and the CC&Rs.

Attorneys have for years generally followed the concept that community associations should not likely bring legal action in neighbor-to-neighbor disputes, even if the dispute involves a violation of the CC&Rs. But does this mean that the association should not get involved at all? Probably not.

For example, a homeowner complains that the neighbor below keeps banging on the ceiling every evening when she gets home. It seems that the lady downstairs believes that the neighbor upstairs is causing too much noise when she walks around her unit. Or how about the unit owner who installs her hard surface flooring without proper sound attenuation which is purportedly causing a nuisance to the neighbor down below? What about the neighbor who complains that their next door neighbor is playing drums, hoarding, or cooking food with strange odors? In each of these situations, the complaint is from one homeowner and involves only one other owner.

These situations are contrasted by the nuisance created by an owner who is constantly having loud parties in their unit, which is affecting many of the residents at the association, or an owner who is a hoarder that is causing an odor to emanate from their unit or is causing vermin or bugs to spill out into the common area and other units. Or, consider an owner or resident that has too many cats and the smell of cat urine is noticeable in the hallway or in other units. Or, consider an owner that has been modifying their home or unit for years creating noise and interference from construction workers, delivery trucks, etc. These types of nuisance CC&R violations are not neighbor-to-neighbor type disputes. California community associations would certainly have more of an obligation to take legal action to enforce the governing documents when the nuisance impacts several, versus one, resident at the association.

Although an association may have the power to take legal action for violations of the rules and/or restrictions in the governing documents, the board does have some discretion deciding whether to exercise that power. If you look at most sets of governing documents, you will see that under the enforcement section that the association "or any owner' may enforce the restrictions. And section 1354 of the California Civil Code states the same.

In California, this issue was addressed in the case of *Beehan v. Lido Isle Community Association* in 1977. In *Beehan,* the Court held that the association should not beheld liable for costs and attorneys' fees incurred by the individual members who brought legal action to enforce a setback restriction against another owner, even though the association had the authority under the governing documents to enforce the setback restriction.

The Court also rejected the plaintiff homeowner's argument that the association's likelihood of prevailing in the litigation should be determinative in the plaintiff homeowner's action to recover their fees and costs incurred. The *Beehan* Court noted:

> The mere fact that a recovery for the corporation would probably result from litigation does not require that an action be commenced to enforce the claim. Even if it appeared to the directors... that at the end of protracted litigation substantial sums could be recovered from some or all of the defendants, that fact alone would not have made it the duty of the directors to authorize the commencement of an action. It would have made it their duty to weigh the advantages of a probable recovery against the cost of in money, time and disruption of the business of the [association] which litigation would entail.

Obviously, the advantages of a probable recovery that would involve only one owner may be outweighed by the cost in terms of attorneys' fees, not to mention involvement by the volunteer board and management (who may actually charge additional money for additional services). But does this mean that the association should not get involved? Probably not, especially if the association wants to try to avoid being sued for not enforcing the governing documents.

The Court addressed this issue (citing the *Lamden*[1] decision) in *Haley v. Casa Del Rey Homeowners Association* (2007) 153 Cal. App. 4th 863. In *Haley*, the Court upheld the board's decision to allow some owners' patios to encroach into the common area.

[1] In the pivotal case on this topic, the California Supreme Court, in *Lamden v. La Jolla Shores Clubdominium Association* (1999) 21 Cal. 4th 249, held that a court should defer to a board's authority and presumed expertise in discretionary decisions regarding the association's maintenance and repair issues. This has now been expanded to governing document enforcement as well.

Although Haley sought to force the board to strictly enforce the association's governing documents (requiring those owners who had already encroached to remove same), the Court held that the board had the discretion to select among means for remedying violations of the CC&Rs without necessarily resorting to litigation, and the court should defer to its decision.

What the cases tell us is that the board has the discretion to consider the nature of the violation, the impact on the community, and the cost in money, time and disruption of the association's business when considering legal action to enforce the governing documents. So while the board may not be obligated to file a lawsuit for every violation, *Haley* tells us the board should take some action. Typically, this requires that the board, at the minimum, investigate. Have a board member or management check to see if they hear the sound, smell the odor, *etc*. The board should consider holding a hearing with all parties and witnesses to see if the issues can be sorted out and the disputes resolved. In addition, or as an alternative, the board should consider facilitating a mediation with all parties pursuant to Civil Code Section 1369.510, *et seq*.

Boards should not ignore complaints by owners, especially when there is a potential for violence. The Court made this clear in the 1986 case of *Troy v. Village Green* case, where the court compared the association to a landlord, holding that the association and the board of directors had a duty to make the common area safe.

A duty to take action may also be imposed by Federal and State Fair Housing law. In a Washington D.C. case, a female owner was harassed by her neighbor who allegedly shouted racial epithets and made sexual comments to her. The woman asked her condominium association to take action to stop the harassment. The association wrote letters to the neighbor, but took no further action. The woman sued the association to obtain redress for racial and sexual harassment alleging that the harassment included a threat of lynching and the utterances of revolting racist and sexist epithets as well as written notes of a racist and sexist nature. She contended that this conduct, perpetrated by her neighbor, and tolerated by the association, deprived her entitlement to fair housing and caused her great emotional and physical harm. When the federal district judge ruled that the association could be held liable for its inaction, the association settled the case by paying the owner $550,000 and buying her condo. *Reeves v. Carrollsburg Condominium OA*.

Sure, a member may say that they pay assessments and therefore the association must take legal action. What they need to understand is that while they do pay assessments,

those assessments are budgeted toward the actual costs of the association, and there is no budget item for legal fees and costs for their respective problems. Owners need to understand that it is not the association's obligation to enforce each and every violation of the restrictions or to get involved in each and every dispute that arises between owners.

While the board does have some discretion, it cannot be discriminatory. The board cannot get involved in trying to resolve a problem between two owners who they like and ignore the pleas of another owner who they do not want to help. The board should explain to the owners, perhaps as part of the rules, the association's enforcement policy. The board should lay out how it will deal with these kinds of disputes, which disputes are the individual homeowner's obligation to enforce by way of legal action and cite the owners to the section of the governing document which permits the individual homeowners to bring their own legal actions.

The board also needs to document these matters in its minutes (in the event the association is named in a lawsuit alleging a failure to enforce the governing documents) the reasons for its decision to take, or to refrain from taking, legal action to enforce a restriction against a property owner, especially when complaints have been received from other owners. Evidence that an association failed to observe its own procedures in deciding to refrain from initiating enforcement actions could prejudice the association's position in a lawsuit by a disgruntled neighboring owner (see *Ironwood Owners Association IX v. Solomon,* 1986 California Case).

In conclusion, although an association may not have to jump into every fight, nor have to file lawsuits for every CC&R or rule violation, the best policy is for the association to investigate, make an informed and intelligent decision on these matters and consider a hearing, offering ADR or legal action if warranted.

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